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In the Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF
ROTARY INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

**Brief of The International Association of Lions Clubs
As Amicus Curiae In
Support of Appellants' Jurisdiction Statement**

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INTEREST OF AMICUS CURIAE

The International Association of Lions Clubs ("Lions" or "amicus") is an international organization of member Lions clubs. Lions shares with Rotary International ("Rotary") the principal purpose of fellowship in service. Founded in 1917, Lions presently has approximately 37,000 clubs, with more than 1,350,000 members in more than 160 countries. Of these, approximately 15,000 clubs, with approximately 550,000 members, are located within the United States. Lions clubs, like Rotary clubs, are relatively small, averaging 37 members per club both nationally and internationally.

Lions is governed by a written constitution which requires that only males of legal majority and good moral character may be considered for membership in a Lions club. The constitution requires that membership in a Lions club be by invitation only and that the club thoroughly investigate the background of any person proposed for membership. The constitution also provides that it may be amended by a two-thirds vote of the registered delegates voting at an International Convention.

Lions initially emphasized the promotion of individual business interests of club members, but that soon changed. Since the first convention in 1917, a major tenet of Lionism has been that no Lions club may hold out the financial betterment of its members as a purpose of the club. Today the Lions constitution requires that no Lions club member or Lions organiza-

tion "use the membership relationship for any solicitation promoting private commercial benefits."

Lions, like Rotary and other service clubs, has recently become involved in state public accommodation act litigation. Actions are currently pending in Oregon and Michigan. In Oregon, the Oregon Court of Appeals (the intermediate appellate court) recently upheld a trial court finding that Lions is a business and therefore a "public accommodation." *Lloyd Lions Club v. Int. Assoc. of Lions Clubs*, 81 Or. App. 151, 724 P.2d 887 (1986).¹ (Appeal to the Oregon Supreme Court is currently under consideration.) In Michigan, the federal district court has granted the plaintiffs' motion for a preliminary injunction enjoining Lions to restore the club charter of the plaintiff Lions club. *Rogers, et al. v. International Association of Lions Clubs*, No. 36-CV-60117-AA (E.D. Mich.). The court held that Lions is a public accommodation under Michigan law, but did not discuss whether the First Amendment protects Lions' right to set its own membership policy.

These cases may reasonably be presumed to presage increased litigation in other jurisdictions. Amicus thus has great interest in the disposition of Rotary's appeal from *Rotary Club of Duarte v. Board of Directors*, 224 Cal. Rptr. 213 (Cal. App. 1986). Summary disposition

¹Not only did the court rule that Lions is a public accommodation in Oregon and therefore that Lions' membership policy violates state law, but the court also held that this violation, without more, subjects Lions to punitive damages. As a result, single-sex clubs and associations in Oregon are now liable for punitive damages for exercising First Amendment rights of association.

of this appeal (even summary reversal of the court below) will leave amicus, its potential adversaries, and courts throughout the land without a clear picture of this Court's present thinking on the strength of the constitutional guaranty of freedom of association. Amicus urgently requests, therefore, that the Court accord plenary consideration to this appeal.

SUMMARY OF ARGUMENT

The First Amendment rights of many private nonprofit clubs and associations are increasingly called into question by a combination of an expansive reading of state public accommodation acts and a disregard of the specific teachings of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Courts, including the California court below, display a willingness to wave the *Roberts* decision like a magic wand causing constitutional guarantees of freedom of association to vanish whenever a state asserts the elimination of sex discrimination as a countervailing interest. The instant case provides an excellent example of this growing phenomenon. This Court should allow full review of Rotary's appeal in order to clarify *Roberts* and to articulate anew in the context of the most recent challenges to associational freedom the right of Americans to associate for legitimate purposes with whomever they choose.

ARGUMENT

Amicus endorses Rotary's Jurisdictional Statement and here focuses on a single point: the basis on which *Roberts* held that Minnesota's public accommodation law properly supersedes the Jaycees' First Amendment right of association is *not* the basis upon which the California Court of Appeal concluded that its state's law applies to Rotary without constitutional offense.

This case, as did *Roberts*, presents a conflict between a state's effort to eliminate gender-based discrimination and the constitutional right of association of a private organization. In *Roberts* the Court found it "useful" to consider separate analyses of what it termed freedom of intimate association and freedom of expressive association. 468 U.S. at 618. As the Court recognized, however, these two "features of constitutionally protected association may * * * coincide." 468 U.S. at 618. "In particular, [this may occur] when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor * * *." 468 U.S. at 618. Amicus agrees that the analytical separation of aspects of associational right may not be applicable in the present instance. However, for purposes of emphasizing the need for full review by this Court of the California Court of Appeal decision, amicus adopts the *Roberts*' framework and restricts its comments to whether California has appropriately applied *Roberts*' reasoning on the issue of expressional association in the present instance.

Roberts observed that Minnesota's public accommodation act "reflects the State's strong

historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." 468 U.S. at 624. Deeming this a legitimate state purpose, the Court relied on the findings of the Minnesota and federal courts that the Jaycees was publicly selling memberships which made available to members services otherwise commercially available. The Court concluded that this dominant commercial aspect of the Jaycees disqualified it from the First Amendment protection to which it otherwise would have been entitled.

The avowed and undisputed purpose of the Jaycees was the self-advancement of its members. See, e.g., 52 U.S.L.W. 3785, 3786 (1984) (reporting that at oral argument, counsel for the Jaycees maintained that "the central reason for [the] existence" of the Jaycees was "the advancement of the interests of young men * * *"). The federal district court stressed that "[t]he Jaycees considers itself to be a young men's leadership training organization * * *." *United States Jaycees v. McClure*, 534 F. Supp. 766, 769 (D. Minn. 1982). The Eighth Circuit found "the similarities [between the Jaycees and] the Dale Carnegie organization [to be] plain." *United States Jaycees v. McClure*, 709 F.2d 1560, 1569 (8th Cir. 1983). Moreover, the Minnesota hearing examiner, the original fact finder in this case, concluded that "the Jaycee organization is different from other organizations in that it * * * offers individual development programs in the areas of personnel, leadership and communications dynamics which are either unavailable or not available to the same degree

in other organizations." (Findings of Fact, No. 25. This report is included in the appendix to the jurisdictional statement submitted in *Roberts*; see 468 U.S. at 616.)

In addition, the Jaycees engaged in active and unselective solicitation of new members. The federal district court found: "One of the major activities of the Jaycees is the sale of memberships * * * [and it] offers no selection criteria for members, save age and sex." 534 F. Supp. at 769. Likewise, the Minnesota Supreme Court specifically found that the Jaycees "encourages continuous recruitment and discourages the use of any selection criteria * * *." *United States Jaycees v. McClure*, 305 N.W.2d 764, 771 (Minn. 1981). On these facts the Minnesota Supreme Court held that the Jaycees was a public business: The Jaycees sold "membership[s] in an organization whose aim is the advancement of its members," 305 N.W.2d at 769, and was "unselective in those to whom it sells its memberships," 305 N.W.2d at 771.

Given the Jaycees' dominant commercial nature—i.e., given the purpose and practice of the Jaycees to make publicly available "commercial programs and benefits," 468 U.S. at 626—this Court held that the First Amendment did not exempt the Jaycees from the application of Minnesota's public accommodation legislation.

The California appellate court has ignored this specific reasoning of *Roberts*. The California court held without elaboration that "infringement of [Rotary's First Amendment right] is clearly justified by this

state's compelling interest in abolishing sex discrimination by business establishments." 224 Cal. Rptr. at 231. "Business establishment" is a statutory term; California's public accommodation statute defines public accommodations to include "all business establishments of every kind whatsoever." See 224 Cal. Rptr. at 219. The California court's holding that Rotary is a business establishment, however, does *not* derive from a finding that Rotary makes "commercial programs and benefits" publicly available.

The California court offered two bases for its conclusion that Rotary is a business establishment; neither involves a finding that Rotary denies citizens of California equal access to publicly available goods and services. The first of these is the contention that Rotary "has sufficient businesslike attributes to render it a business establishment" under California law. 224 Cal. Rptr. at 224. The California court provides four reasons for this claim. The first derives from Rotary's "organizational structure." The court describes Rotary as an organization "administered by [a] Board which consists of 17 members which controls and manages the affairs and funds of [Rotary]." 224 Cal. Rptr. at 222. The court then in effect works its way through an organization chart of Rotary, describing positions and responsibilities, see 224 Cal. Rptr. at 222-223, and concludes that "this brief overview clearly establishes that [Rotary] is an organization which exhibits substantial businesslike attributes." 224 Cal. Rptr. at 223.

Manifestly, this reasoning does not implicate the purpose of public accommodation legislation to eliminate discrimination in publicly available goods and services. Moreover, the reasoning is patently overbroad, since it would apply to any large, well-organized association, no matter what its purposes or practices.

Second, the court states that "[c]ommercial attributes and advantages * * * become obvious when the functions and responsibilities of the communications division of the secretariat are scrutinized." 224 Cal. Rptr. at 223. In this regard, however, the court mentions only that this division publishes "a wide range of Rotary books, manuals, pamphlets [sic], and periodicals." 224 Cal. Rptr. at 223. The court does not suggest, for instance, that Rotary is in the business of selling such publications to the general public. Thus, the court's second observation, like its first, does not support a claim that Rotary discriminates in providing publicly available goods or services.

The court's third and fourth points are that Rotary licenses the use of the Rotary emblem to firms which manufacture items bearing the Rotary emblem for sale to Rotarians, and that Rotary publishes a directory, which in addition to listing all clubs with the time and place of meetings, also lists hotels owned or operated by Rotarians or which are meeting places or headquarters of Rotary clubs and firms which have been licensed to manufacture or sell Rotary-approved items. But, once again, it is apparent that however the court believes that such considerations show that Rotary is a "business establishment" for purposes of

California law, the cited facts are unrelated to those purposes and practices of the Jaycees which formed the factual predicate for the holding in *Roberts*. In sum, although Rotary arguably has certain "businesslike attributes," it does not sell commercially valuable services to the general public.

The California court's second basis for its holding that Rotary is a business establishment is that Rotary has "provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members." 224 Cal. Rptr. at 226. The court acknowledges that "official policy promulgated by [Rotary] * * * 'specifically prohibits any attempt to use the privilege of membership for commercial advantage.' " 224 Cal. Rptr. at 225. The court also recognizes that the trial court held that the advantages of enhanced business contacts were " 'incidental to the principal purposes of the association which are to promote fellowship for *noncommercial* and *noneconomic* objectives [trial court emphasis] and to secure the voluntary uncompensated participation of business and professional men' in services and activities performed on a local, national and international level." 224 Cal. Rptr. at 224. The appellate court, however, upon independent review of the evidence in the record, concluded that such benefits were "substantial" and warranted the conclusion that Rotary was a business establishment.

Ignoring the court's arrogation to itself of unusual powers of review, its assessment of the evidence does not imply that Rotary discriminates in the provision

of publicly available goods and services. The court for instance does not conclude (as did the Minnesota Supreme Court of the Jaycees) that member clubs indiscriminately recruit new members from the general public.

Roberts rests its result on the evaluation that an organization which makes commercially valuable goods or services publicly available cannot claim First Amendment protection against a state's demand that the organization refrain from discriminating in its membership policies; if an association has a dominant commercial purpose, it must make its publicly provided goods and services available on a nondiscriminatory basis. Rotary's membership policies, as well as those of many other service clubs, cause no affront to the rationale of *Roberts*. Although such associations as Rotary, Lions, Kiwanis, and Soroptimist engage in gender discrimination in their membership policies, these organizations do not discriminate "in the allocation of publicly available goods and services." Indeed, *Roberts* itself suggests the distinction between organizations such as Jaycees, which in purpose and practice provides commercially valuable services to club members, and service organizations such as Rotary, Lions, Kiwanis, or Soroptimist, whose public purpose is community service and whose long-standing policies are that members shall not use their clubs for their personal business benefit. If a state law allows that mere size and organizational structure can subject a private organization to the requirements of a state public accommodation statute, or if the nonpurposeful (and incidental) opportunity to make business contacts is sufficient to convert a private nonprofit organization

into a "business establishment," such a state law would be susceptible of an overbreadth challenge. When the Jaycees raised such an overbreadth challenge, the Court responded: "[W]e need only note that the Minnesota Supreme Court expressly rejected the contention that the Jaycees should 'be viewed analogously to private organizations such as the Kiwanis International organization.' " 468 U.S. at 630. Apparently this Court is prepared to distinguish the Jaycees from organizations such as Rotary and Kiwanis along lines not considered by the California court.

In *Roberts*, this Court explained that "acts of invidious discrimination in distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent * * *," 468 U.S. at 628. Amicus concurs. However, lower courts are taking this statement of principle as a license to regulate the membership policies of associations which by no stretch of the imagination discriminate in the distribution of publicly available goods or services. This is true of the California court in the instant case, and it is true in differing ways of the Oregon Court of Appeals in *Lloyd Lions Clubs v. Int'l. Assoc. of Lions Clubs* and the Federal District Court of New Jersey in *Kiwanis Intern. v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381 (D. N.J. 1986). As a result, the rights of United States citizens to associate with whom they choose for noncommercial purposes and to engage in otherwise constitutionally protected activity are everywhere in danger. Further guidance from this Court on the scope of *Roberts* is urgently required.

CONCLUSION

Amicus, like Rotary, is committed to private charity and community service. At present, however, a cloud of uncertainty hangs over the question whether such private service organizations may continue to adhere to chosen membership policies in proceeding with their humanitarian endeavors. Decisions like that of the California court below invite challenges to the membership policies of other clubs and associations in California and elsewhere. All the while the constitutions of Rotary, Lions, and other similar organizations decree single-sex membership policies (while detailing procedures for changing those policies). The result is, and will be, litigation in which no possibility for compromise and settlement is possible—litigation, furthermore, which consumes resources otherwise available for charitable purposes. Ultimate resolution of this litigation, lies with this Court's understanding of the meaning and scope of the oft-recognized constitutional right of association. This case affords the

Court an excellent opportunity for much-needed post-*Roberts* clarification of this right. Amicus urges the Court to note probable jurisdiction of Rotary's appeal.²

Respectfully submitted,

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²Written consent of the parties accompanies this brief.